No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a non-profit civil rights organization devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current development in American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by how the regime of "*Auer* deference"—like other agency-deference doctrines—requires federal judges to *defer* to another entity's interpretation *of the law*. This requirement represents an abdication of the judicial duty of independent judgment, and it ensconces a systemic bias in the courts in favor of agency litigants. This case presents an opportunity for the Court not only to overturn the doctrine of "*Auer* deference," but also to recognize the constitutional defects of *Auer* and *Seminole Rock*.

SUMMARY OF THE ARGUMENT

The Constitution requires federal judges to exercise independent judgment and refrain from bias when interpreting the law. These are foundational constitutional requirements for an independent judiciary. Article III gives federal judges life tenure and salary protection to

ensure that judicial pronouncements will reflect the judges' independent judgment rather than the desires of the political branches. And the Due Process Clause prohibits judges from displaying any type of bias toward litigants when resolving disputes. These aspects of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or harbor bias toward a litigant would be a scandalous insinuation.

Yet the judiciary has been flouting these foundational constitutional commands by "deferring" to an agency's interpretation of its own rules. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). And while the "*Auer* deference" doctrine has been roundly criticized, the bulk of criticism has focused on *Auer*'s incompatibility with the APA[2] and the bad incentives that *Auer* creates for agency behav-

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2. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) ("By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1, 9 (1996) ("Section 706 of the APA declares that 'the reviewing court * * * shall determine the meaning or applicability of the terms of an agency action.' On the face of this statute, it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively give controlling effect to a not-inconsistent agency position.").

ior.[3] As a result, the glaring *constitutional* problems with this court-created deference regime have all too often been overlooked or else relegated to the periphery.[4]

Because NCLA's two main constitutional objections to *Auer*—independent judgment and judicial bias—have not been previously litigated before this Court, *stare decisis* does not bind the Court here. Indeed, because each member of this Court is bound by oath to support and defend the Constitution of the United States, *see* 5 U.S.C. § 3331, he or she has a duty to address and expound *Auer's* constitutional defects. If this Court were considering the constitutionality of a statute, this Court would have reason to avoid pronouncing the statute unconstitutional if a non-constitutional disposition of the case were available.[5] But where this Court is

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3. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) ("[W]hen an agency interprets its *own* rules, . . . the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."); Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 320 (2017) (contending that "the strongest objections to *Auer*" surround the concern "that if those who write laws (regulations) can also interpret them, there is a risk of bias.").

4. *See, e.g.*, Br. for Pet'r (devoting only two pages to the constitutional problems with *Auer* deference).

5. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 306–07 (1980) ("It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will inquire first into the statutory question."); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. &*

(continued...)

considering the constitutionality of its own doctrine—a doctrine that commands justices of this Court and judges of lower courts to abandon their independent judgment and exhibit bias in violation of the due process of law—the Court has a duty to act promptly in confessing error and correcting its own unlawful doctrine.

The reputation and enduring institutional legitimacy of this Court depend on its courage in facing up to difficult problems, including its own unconstitutional doctrines. There is no appeal from the erroneous judgments of the Supreme Court except to this Court at a later time, and there is no relief from the Court's own unconstitutional doctrines other than in this Court. Accordingly, any decision that "avoids" recognizing the patent constitutional defects with *Auer* and other agency-deference doctrines would leave Americans without an adequate judicial remedy.

ARGUMENT

The practice of "*Auer* deference" violates the Constitution for two separate and independent reasons. First, *Auer* requires judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. Second, *Auer* violates the Due Process Clause by commanding judges to exhibit bias toward litigants. We

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Station Employees, 466 U.S. 435, 444 (1984) ("When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty.").

will address each of these constitutional violations in turn.

I. *AUER* DEFERENCE VIOLATES ARTICLE III BY COMMANDING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

The first constitutional problem with *Auer* is that it compels judges to abandon their duty of independent judgment. The federal judiciary was established as a separate and independent branch of the federal government, and the duty of independent judgment was understood to be conveyed to the judges at the same time that judicial power was vested in the courts. This duty was, and still is, inherent in the office of a judge. And to protect this independent judgment, the judges of the federal courts were secured in tenure and salary, thus shielding their decisionmaking from the influence of the political branches. *See* U.S. Const. art. III.[6]

Yet *Auer* commands Article III judges to abandon even the pretense of judicial independence by giving automatic weight to an agency's opinion of what its regulations mean—not on account of its persuasiveness, but merely due to the fact that this non-judicial entity has weighed in on the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("'The judicial power ... requires a court to exercise its independent judgment in interpreting and expounding upon the laws'" (quoting

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6. For a more elaborate discussion of the duty of independent judgment in American law, *see* Philip Hamburger, *Law and Judicial Duty* 507–35 (Harvard 2008).

Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring))).

Such abandonment of independent judgment would never be tolerated in any other context—even if it were commanded by statute and even if it commanded deference to a truly expert body. Imagine if a statute established a committee of expert law professors and instructed the federal judiciary to "defer" to this committee's announced interpretations of federal regulations so long as they were "reasonable." A statute of this sort would be laughed out of court; it would be declared a gross violation of Article III and a perversion of the independent judgment that the Constitution requires from the judiciary. Yet *Auer* operates precisely the same way: It allows a non-judicial entity to partake in the powers of judicial interpretation, and it commands judges to "defer" to the legal pronouncements of a supposedly expert body external to the judiciary.

Stripped down to its essence, *Auer* is a command that judges abandon their duty of independent judgment and assign weight to a non-judicial entity's interpretation of an agency regulation.[7] It is no different in practice from

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7. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 316–17 (Chicago 2014); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1202-03, 1205–10 (2016). Hamburger writes that "the deference to interpretation is an abandonment of judicial office. The Constitution grants judicial power to the courts, consisting of judges, who were assumed to have an office or duty of independent judgment. The Constitution thereby establishes a structure for providing parties with the independent judgment of the judges, and this means their own, personal judgment, not (continued...)

an instruction that courts assign weight and defer to interpretations of agency regulations announced by a congressional committee, a group of expert legal scholars, or the New York Times editorial board. In each of these scenarios, the courts would be following another entity's interpretation of an agency rule so long as it were "reasonable"—even if the court's own judgment would lead it to conclude that the regulation means something else.

A judge who behaved in such a manner would be accused of gross dereliction of duty and violating Article III, which not only empowers but requires the courts to resolve the "cases" and "controversies" in their jurisdiction,[8] and which makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone rely upon the judgment of entities that

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deference to the judgment of the executive, let alone the executive when it is one of the parties. Nonetheless, the judges defer to judgments of the executive, and they thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their office as judges." Hamburger, *Is Administrative Law Unlawful?* at 316. Hamburger also writes: "Judges, in adjudicating their cases, . . . have the duty to exercise their own independent judgment about what the law is, including their own independent judgment about the interpretation of the law. Accordingly, when judges defer to agency judgments about . . . interpretation, the judges abandon their very office or duty as judges." Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. at 1249-50.

8. *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

are not independent and do not enjoy life tenure or salary protection. The constitutional offense is even greater when judges behave this way in lockstep under the command of the Supreme Court.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation of a regulation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them."); *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 270 (Mich. 2008) ("'Respectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions."). An agency is entitled to have its views heard and considered by the court, just as any other litigant or amicus party, and a court may and should consider the "unique insights" an agency might bring on account of its expertise and experience. *Tetra Tech*, 914 N.W.2d at 53; *see also id.* ("'[D]ue weight' means giving 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law. . . . 'Due weight' is a matter of persuasion, not deference."). None of this respectful consideration compromises a judge's duty of independent judgment. But *Auer* requires far more; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to

the views expressed by the agency. The duty of independent judgment allows courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts "defer" or give automatic weight to a non-judicial entity's interpretations of regulatory language.[9]

II. *AUER* DEFERENCE VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO DISPLAY BIAS

A related and even more serious problem is that *Auer* deference removes the judicial blindfold. It requires judges to display systematic bias toward agencies—and against their counterparties—when they appear as litigants.[10] It is bad enough that a judge would abandon his Article III duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a judge to abandon his independent judgment in a manner that favors an actual *litigant* before the court is an abomination.

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9. *See, e.g.*, *King v. Mississippi Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018) (rejecting judicial deference to agency interpretations of statutes because such deference prevents courts from "fulfilling their duty to exercise their independent judgment about what the law *is*." (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring))).

10. *See generally* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Hamburger explains that "the Constitution prohibits judges from denying the due process of law, and judges therefore cannot engage in systematic bias in favor of the government. Nonetheless, judges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties." *Id.* at 1250.

A. Showing Bias Toward an Agency Litigant Violates Due Process

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Auer* institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever the parties dispute the meaning of an agency regulation. Rather than exercise their own judgment about what the law is, judges under *Auer* consciously defer to the judgment of one of the litigants before them.

A judge who openly admits that he accepts a plaintiff's interpretation of agency regulations whenever it is "reasonable"—and that he automatically rejects any competing and perhaps more reasonable interpretation that might be offered by a defendant—would be impeached and kicked off the bench for bias and abuse of power. Yet this is exactly what judges do whenever they apply "*Auer* deference" in cases where the agency appears as a litigant. The government litigant wins as long its preferred interpretation of the regulation seems "reasonable"—even if it is wrong—while the opposing litigant gets no such indulgence from the court and must show that the government's view is not merely wrong but *unreasonably* so.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent

upon me."[11] And judges are ordinarily very scrupulous about living up to these commitments. Nonetheless, under *Auer*, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold and precommit to favoring the government agency's position.

Whenever *Auer* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal.").

B. Showing Bias Against a Litigant Opposed to an Agency's Position Denies Due Process

Even when the government is not a litigant, but appears as an amicus curiae (or when the Solicitor General is invited to participate in a case), deferring to the government's position under *Auer* still denies due process to whichever litigant stands opposed to the government's position. Rather than have the opportunity to convince

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11. 28 U.S.C. § 453 (2012) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'").

an impartial magistrate of the rightness of the litigant's cause, that litigant is forced to try to overcome the government's thumb on the scale for her opponent. Such favoritism may happen even when the government's position is created in the course of that very litigation. *See, e.g.*, *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) (criticizing the Seventh Circuit for deferring under *Auer* to an agency's interpretation of its rules that was set forth in an amicus brief); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by . . . bias").

C. Other Canons of Construction Construe Ambiguity Against Government Drafters

Of course, *Auer* might be defended on the ground that there are other canons of construction that purport to stack the deck in favor of a litigant appearing before the court. *See, e.g.*, *Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537, 547 (1956) ("[A] question as to the meaning of a taxing act to be read in favor of the taxpayer."); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975) ("[L]egal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible

scope."). These canons give a boost to those who litigate *against* the government, and they seek to encourage clear and precise drafting of tax laws, criminal statutes, and treaties with Indian tribes. They therefore cannot explain or excuse a practice that weights the scales *in favor of* a government litigant—the most powerful of all parties to appear before a court—and that commands systematic bias in favor of the government's preferred interpretations of agency regulations.

III. The Doctrine of *Stare Decisis* Cannot Support the Retention of This Unconstitutional Precedent

Defenders of *Auer* will no doubt try to salvage the doctrine by invoking *stare decisis*—and act as though there is some binding legal obligation to adhere to this precedent, notwithstanding its blatant unconstitutionality. This Court should reject emphatically any attempt to defend *Auer* on *stare decisis* grounds.

First, and most basically, a judge's ultimate duty is to follow the law—in this case, the Constitution—even if that comes at the expense of a judicial precedent. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Second, neither *Auer* nor *Seminole Rock* even considered or addressed this brief's brace of constitutional objections to a regime of agency deference—and neither has any subsequent decision of this Court. So it cannot be said that this Court has rejected these constitutional arguments by adhering to *Auer* for 22 years, or by adhering to *Seminole Rock* for 74 years. Judicial prece-

dents do not resolve issues or arguments that were never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with.").[12] *Stare decisis* therefore cannot excuse this Court from recognizing these constitutional concerns and declaring *Auer* deference unconstitutional.

Third, *Auer* is not an ordinary precedent because this Court did not simply make an error in that case about an unconstitutional act by another branch of government; rather the Court itself created a doctrine that violates the Constitution. If this Court in *Auer* had mistakenly upheld an unconstitutional statute, then this Court would not have acted unconstitutionally, but simply would have erred. In *Auer*, however, the justices, acting for the Court, abandoned their Article III duty of independent judgment; further, they engaged in bias in favor of one of the parties in violation of the Fifth Amendment's guarantee of due process of law. They even required all judg-

12. *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

es, high and low, to engage in such violations of the Constitution.

Regrettably, therefore, it is difficult to avoid the conclusion that in *Auer* this Court itself acted unconstitutionally. And where this Court is reconsidering its own unlawful doctrine in a prior case, the judges cannot attribute much precedential weight to that case without making it impossibly difficult for the Court to correct its own past Constitutional transgressions.

The only appeal from this Court's unlawful acts, let alone its mere errors, is to this Court at a later time. Although this means that this Court is not legally accountable to any other branch of government, it also means that this Court must be especially open to holding itself accountable. Otherwise, there would no judicial remedy against this Court's own errors and injustices. Although lower courts must avoid departing from high-court precedent, this highest of courts must avoid embracing so strong an attachment to precedent as to prevent it from reconsidering its own errors and even its own unconstitutional doctrines.

Fourth, this Court's duty to overrule *Auer* is reinforced by the damage done by that case to the Court's reputation. Of course, judges should never depart from the law—not even on account of concerns for the judiciary's reputation. But they should keep in mind that their reputation for integrity depends on their adhering to the law and that to preserve this reputation they need to be willing to correct their errors. Every day that *Auer* remains law, this Court bars Americans from obtaining im-

partial adjudications on administrative rules. Every day, therefore, *Auer* erodes this Court's legitimacy.

As Justice Story predicted, "[I]f any changes shall hereafter be proposed, which shall diminish the just authority of this, as an independent department, they will only be matters of regret, so far as they may take away any checks to the exercise of arbitrary power by either of the other Departments of the Government." Joseph Story, *A Familiar Exposition of the Constitution of the United States* ch. 30, § 305, p. 185 (The Classics of Liberty Library 1994). Story had in mind primarily threats to the tenure of judges, but in diminishing the just authority of the judiciary as an independent department, *Auer* deference has surely become a "matter of regret." *Id.*

IV. The Court Must Confess Its Constitutional Errors in *Auer*

Indeed, because each member of this Court is bound by oath to support and defend the Constitution of the United States, *see* 5 U.S.C. § 3331, he or she has a duty to address and expound *Auer's* constitutional defects.

If this case concerned the possible unconstitutionality of a statute, this Court could hold it unconstitutional only if it were manifestly or evidently unlawful, and this Court would ordinarily have reason to avoid holding it unconstitutional if there were a non-constitutional ground for its decision.[13] But because this Court is considering the constitutionality of a doctrine of its own making, the justices are not limited by these ordinary

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13. *See* note 5, *supra*.

limitations on holding an act unconstitutional. Indeed, because the Court is considering its own unconstitutional doctrine in *Auer*, the justices have a duty, at least under their oath, to rest their decision candidly on the doctrine's constitutional failings.

This is all the more necessary because *Auer* requires not only the justices but all other judges to abandon their independent judgment and to engage in bias that denies litigants the due process of law. *Auer* thereby infects the entire judicial system.

The reputation of this Court rests on more than simply the correction of its past errors—though that is important. Its reputation also rests on its courage in candidly facing up to difficult problems, including its own violations of the Constitution. As already noted, there is no appeal from this Court except to this Court at a later time, and no justice against the Court's own unconstitutional doctrines other than in this Court. The American people must therefore have confidence that this Court will not hide from its own errors, let alone its own departures from law. Far from preserving this Court's reputation, any decision that "avoids" recognizing the patent constitutional defects with agency-deference doctrines would leave Americans with the impression that the Court lacks the courage to confront its own past mistakes.

This Court is not accountable to previous litigants whom *Auer* deference has harmed. But it is intellectually and morally accountable, and it should embrace this opportunity to recognize the full extent of the problems with *Auer* deference. This doctrine's shortcomings in-

volve the most fundamental attributes of the federal judiciary—independent judgment and avoiding bias—and this Court must set the record straight on these matters as forthrightly as possible to atone for the damage this doctrine has done.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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